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Nos. 80-1208, 80-1471 and 80-1610.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

NEW ENGLAND POWER COMPANY,
APPELLANT,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,
APPELLEES.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL,
APPELLEE.

DENNIS J. ROBERTS II, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,
APPELLEES.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

Brief of Appellants Dennis J. Roberts II, et al.

DENNIS J. ROBERTS II,
Attorney General of Rhode Island,
JOHN R. MCDERMOTT,
Special Assistant Attorney General,
72 Pine Street,
Providence, Rhode Island 02903.
(401) 274-4400
Counsel of Record
Counsel for Appellant
State of Rhode Island

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

Invoking for the first time a 1913 state statute, the New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling outside the state any energy generated by NEP's federally licensed hydroelectric projects in New Hampshire. The energy is currently delivered to an interstate transmission network and sold in three New England states including New Hampshire. These appeals are from a judgment of the New Hampshire Supreme Court upholding the state statute as applied by the PUC. The questions presented are:

1. (a) Whether the New Hampshire statute as applied by the PUC to secure the economic benefits of hydroelectric energy generated within the state exclusively for the citizens of that state unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution?

(b) Whether Congress, in providing in Section 201(b) of Part II of the Federal Power Act that nothing in Part II "shall deprive" any state of "lawful authority now exercised" over hydroelectric energy exports, affirmatively granted New Hampshire the power to restrict such exports?

2. Whether Part I of the Federal Power Act, vesting comprehensive licensing authority in the Federal Energy Regulatory Commission ("FERC") over NEP's hydroelectric projects, preempts the statute as applied by the PUC?

3. Whether Part II of the Federal Power Act, vesting exclusive jurisdiction in FERC over wholesale sales of electricity in interstate commerce, preempts the state statute as applied by the PUC to require NEP to rearrange its existing wholesale tariffs and contracts to effect a transfer of the economic benefits of the hydroelectric energy to New Hampshire citizens?

4. Whether the New Hampshire statute, as construed and applied by the New Hampshire Supreme Court and the PUC,

violates the privileges and immunities of the citizens of the State of Rhode Island and the Commonwealth of Massachusetts in contravention of article IV, § 2 of the United States Constitution?

5. Whether, assuming that Congress has exempted the New Hampshire statute from the reach of the Commerce Clause, Congress has violated that Clause by favoring one state over another in an area of fundamental economic and social importance, or, alternatively, whether Congress has violated the rights of the State of Rhode Island and its citizens and the Commonwealth of Massachusetts and its citizens, as guaranteed by the Tenth Amendment or the Privileges and Immunities Clause?

Parties to the Proceeding Below.

The following parties appeared before the New Hampshire Supreme Court: New England Power Company, Commonwealth of Massachusetts, Dennis J. Roberts II, Attorney General of Rhode Island, Edward F. Burke, Administrator of the Rhode Island Division of Public Utilities and Carriers, the State of New Hampshire and the New Hampshire Legislative Utility Consumers' Council.

All of the parties appearing before the New Hampshire Supreme Court are listed in the caption.

Appellant Dennis J. Roberts II, Attorney General of the State of Rhode Island, is, pursuant to R.I. Gen. Laws § 42-9-6, the "legal advisor of the individual legislators of the general assembly, of all state boards, divisions, departments, and commissions and the officers thereof. . . ." Under common law, he is the representative of the public, empowered to bring actions to redress grievances suffered by the public as a whole.

Rhode Island Gen. Laws §§ 39-1-1, *et seq.*, vest in Appellant Edward F. Burke, Administrator of the Rhode Island Division of Public Utilities and Carriers:

> the exclusive power and authority to supervise, regulate and make orders governing the conduct of companies offering to the public in intrastate commerce energy . . . for the purpose of increasing and maintaining the efficiency of such companies, according desirable safeguards and convenience to their employees and to the public, and protecting them and the public against improper and unreasonable rates, tolls and charges by providing full, fair and adequate administrative procedures and remedies. . . .

R.I. Gen. Laws § 39-1-1.

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Opinions Below.

The opinion of the New Hampshire Supreme Court (J.S. App. 1a-14a)[1] is not yet reported. The PUC's Report and Order dated August 27, 1980 (J.S. App. 15a-24a) and its Report and Order dated September 19, 1980 (J.S. App. 25a-40a) are also unreported.

Jurisdiction.

This is an appeal from a final judgment of the New Hampshire Supreme Court upholding a New Hampshire statute as applied by the New Hampshire Public Utilities Commission to ban the export of hydroelectric energy generated within the state. The Court rejected claims that the statute as so applied violates the Constitution and laws of the United States. Judgment was deemed to have been entered on December 23, 1980, when the decision of that Court was docketed by its clerk. Notices of appeal were filed below on January 12, 1980 (J.S. App. 41a; 80-1610 J.S. App. 1a) and January 15, 1980 (80-1471 J.S. App. 3a). The appeals were docketed on January 19, 1981 (No. 80-1208), February 27, 1981 (No. 80-1471) and March 23, 1981 (No. 80-1610). On May 18, 1981, this Court noted probable jurisdiction and consolidated the three cases. The Court has jurisdiction of these appeals under 28 U.S.C. § 1257(2).

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 80-1208.

Constitutional and Statutory Provisions Involved.

This case raises questions concerning the validity of New Hampshire's hydroelectric export statute, NH RSA 374:35, under the Commerce and Supremacy Clauses of the United States Constitution (art. I, § 8, cl. 3 and art. VI, cl. 2) and the Federal Power Act (16 U.S.C. §§ 792-824k).

New Hampshire RSA 374:35 provides:

> Permission Required. No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

Article I, § 8, cl. 3 of the United States Constitution provides:

> The Congress shall have power
>
> . . . . . .
>
> To regulate Commerce with foreign Nations, and among the several States and with Indian Tribes; . . ..

Article VI, cl. 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statement of the Case.

This case involves an attempt by New Hampshire to secure the ultimate economic benefits of one of its natural resources exclusively for the benefit of its own citizens. The resource in question is the energy of that portion of the Connecticut River within New Hampshire. Such energy is converted to electric energy by privately owned plants situated along the river. This electric energy is then delivered to a highly integrated, regional transmission grid serving all of New England. The New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling the energy outside of New Hampshire. The stated goal of the PUC's Order was to reduce electric rates for New Hampshire consumers at the expense of consumers in Rhode Island and Massachusetts.

A. Facts.

NEP is a public utility which generates and transmits electricity at wholesale in interstate commerce (J.A. 11a-12a).[2] In

[2] "J.A." refers to the Joint Appendix.

Rhode Island, NEP sells electricity to the Narragansett Electric Company (J.A. 7a-8a). The Narragansett Electric Company in turn resells this electricity at retail to Rhode Island consumers. In addition to its sales to Narragansett, NEP sells electricity to other retail affiliates (J.A. 7a-8a). These affiliates in turn resell the electricity to customers in Massachusetts and New Hampshire. In addition, NEP also sells power at wholesale to some thirty nonaffiliated utilities (J.A. 8a).

The hydroelectric units over which the Commission asserts jurisdiction provide approximately 420 megawatts of generating capacity for NEP (J.A. 16a). These units are located along the Connecticut River, which divides New Hampshire from Vermont (J.A. 9a-10a). Each of these units is licensed by the Federal Energy Regulatory Commission ("FERC") (J.A. 11a-12a).

NEP is a member of the New England Power Pool ("NEPOOL") (J.A. 12a-13a). That organization provides for the coordinated operation of the bulk power supply systems in New England (J.A. 13a-14a). Its membership includes over 98% of the generation capacity and virtually all of the transmission facilities within the six-state New England region (J.A. 30a). Its functions also include provision for joint efforts and planning on a regional basis to meet the future electric power needs of the New England region (J.A. 13a, 31a). Its goals, which have been successfully met, are to ensure that the electric utilities of New England, and their customers, "obtain an equitable share of the benefits of reliable interconnection, economies of scale, and system back up in emergencies" (J.A. 26a). Given its obvious advantages and success, NEPOOL should serve as a model for the rest of the country.

The economic advantage which New Hampshire seeks to gain arises in the following manner. At present, generating capacity is dispatched by NEPOOL's centrally located computer dispatch system (J.A. 32a). Under the system, the least

expensive combination of generating capacity is placed in service to meet the system's needs. *Id.* Thus, at any given time, the power is generated in the most efficient manner by this central assignment of the most efficient units.

Each generating unit has its own incremental cost of supplying power. Because hydroelectric generating units develop power without the necessity for the consumption of fossil fuels, the necessity for a fuel adjustment charge is avoided (J.A. 14a, 35a). By claiming all of the hydroelectric power, New Hampshire will reduce its dependence on fossil fuel generation and correspondingly increase its neighbors' needs for such generation. Thus New Hampshire will shift its fuel costs to its neighbors.

NEP's operations are comprehensively regulated by FERC under the Federal Power Act. For example, NEP's wholesale rates are subject to approval by the FERC (J.A. 10a-11a). Likewise, NEP's participation in NEPOOL is governed by an agreement investigated and approved by the FERC. *New England Power Pool Agreement*, Opinion 775, 10 FPS 5-594 (1976), *affirmed*, *Municipalities of Groton* v. *Federal Energy Regulatory Commission*, 587 F.2d 1296 (D.C. Cir. 1978). Attorney General Roberts and Administrator Burke ("Rhode Island") have been regular and active participants in such regulatory proceedings before the FERC regarding NEP.

B. Proceedings Before the PUC.

On November 21, 1979, the PUC instituted an investigation to determine whether it should continue to permit NEP to export hydroelectric energy generated at NEP's Connecticut River plants (J.A. 4a-6a). The PUC contended that it had the authority to take such action under NH RSA 374:35 ("the New Hampshire statute"). Since 1913, New Hampshire had asserted

a statutory right to require its approval prior to the export of hydroelectric power from New Hampshire. In each instance, since 1913, this permission had been granted. Now, an abrupt reversal was to take place.

NEP and Rhode Island moved to dismiss the proceedings, asserting that the PUC's proposed course of action was unconstitutional. The parties argued to the Commission that three federal grounds barred its proposed course of action:

(1) It would place an undue burden on interstate commerce;
(2) Such action was preempted by FERC licensing authority over NEP's hydroelectric projects under Part I of the Federal Power Act; and
(3) The statute in question had likewise been preempted by FERC's regulation of NEP's wholesale sales under Part II of the Act.

The PUC initially deferred ruling on the motions to dismiss. In the interim, hearings on the merits were held. On August 27, 1980, the PUC denied the motions to dismiss (J.S. App. 15a-24a).

The PUC issued its ruling on the merits on September 19, 1980 (J.S. App. 25a-40a). Interpreting the Act to permit appropriation of economic benefits without requiring the physical retention of the hydroelectric power, the PUC formally withdrew the existing permission to export this energy. NEP was directed to make arrangements to sell this power "to persons, utilities and municipalities within the state of New Hampshire."

C. The New Hampshire Supreme Court's Decision Below.

Each of the appellants in this consolidated case filed an appeal from the PUC's August 27 and September 19 Orders. The

Court rejected the various federal and state claims of the parties and upheld the New Hampshire statute as applied by the PUC (J.S. App. 1a-14a).

The New Hampshire Supreme Court rejected the parties' arguments that the New Hampshire statute as applied by the PUC violated the Commerce Clause (J.S. App. 6a-8a, 10a-12a). Instead, the Court found that the New Hampshire statute had been from its conception a proper exercise of a state's powers under the Commerce Clause. At the same time, the Court also found that Congress had "recognized as valid and lawful" this exercise of the state's authority by inserting a savings clause in Section 201(b) of Part II of the Federal Power Act (J.S. App. 7a-8a).

The Court likewise rejected the parties' claims that the PUC was preempted from exercising such authority by Parts I and II of the Federal Power Act. In so finding, the Court characterized the Commission's actions as "not a control of rates but rather a control of the assignment of the power" (J.S. App. 12a). At the same time, the Court did acknowledge that "new rates, contract modifications, or accounting adjustments . . . may naturally flow from the export termination" (J.S. App. 14a).

The Court remanded the case to the PUC for further proceedings to implement the Commission's Order. The PUC has not acted on remand pending resolution of these appeals by this Court.

Summary of Argument.

The New Hampshire PUC's Order purports to require NEP to give the economic benefits of electric energy generated from hydropower only to New Hampshire consumers. The Com-

merce Clause prohibits New Hampshire from so securing those economic benefits of its own resources exclusively for New Hampshire consumers. *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911). The interstate transmission and sale of electric energy constitutes interstate commerce. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

New Hampshire's actions and its effects on their neighbors illustrate the fundamental interdependence of the states which underlies the Commerce Clause's prohibition against such attempts. From the wry jests of the founding fathers that they must hang together or they would hang separately to the sophisticated markets of modern commerce, the states have prospered because of the synergistic nature of the Union, not as a result of their own success at retaining their natural assets. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

New Hampshire's reliance on Section 201(b) of Part II of the Federal Power Act is misplaced. On its face, that section says no more than that Part II shall not "deprive" a state of its "lawful authority now exercised" over the export of hydroelectric energy. The natural and obvious meaning of this language is that the states may retain whatever authority they lawfully exercised prior to the passage of Part II. To read it as a Congressional endorsement and ratification of whatever lawful or unlawful practices the states had theretofore engaged in in this regard is to strain the plain meaning of such language beyond its capacity. It is far more logical to assume that Congress, uncertain about the legal validity of what the states had been doing, cautiously decided to leave such questions to the court and to only preserve "lawful" activity.

As to the balance of the issues on appeal, these Appellants rely on and incorporate by reference herein the arguments and authorities of the Appellants in Nos. 80-1208 and 80-1471 in Parts II through V.

Argument.

I. New Hampshire's Hydroelectric Export Statute as Applied by the PUC Violates the Commerce Clause.

This matter requires the Court to make the same two-part analysis that it made in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), in striking down the statutes challenged therein under the Commerce Clause. In that case, the Court described the appropriate inquiries:

> The first is whether the statutes, viewed independently of federal legislation regulating the banking industry, burden interstate commerce in a manner contrary to the Commerce Clause. The second is whether Congress, by its own legislation in this area, has created an area in which the States may regulate free from Commerce Clause restraints.

447 U.S. at 35.

A. *State Action that Unduly Burdens Interstate Commerce Violates the Commerce Clause.*

The Commerce Clause provides that "The Congress shall have power . . . To regulate Commerce . . . among the several States." U.S. Const., art. I, § 8, cl. 3. As this Court has noted, the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

State attempts at economic protectionism have consistently been struck down by this Court, including attempts to restrict the sharing of natural resources with other states. *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911). In that case, the Court noted that:

> If the states have such power, a singular situation may result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals.

221 U.S. at 255. The Court might well have added, "New Hampshire might keep its hydropower."

B. *The New Hampshire Statute as Interpreted and Applied by the PUC and the New Hampshire Supreme Court Violates the Commerce Clause.*

In *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 86 (1927), this Court held that electricity transmitted in interstate commerce is subject to the protections of the Commerce Clause. Recently, relying on *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), and *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), the Court stated:

> "The location in a given state of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even principally for the state's residents." *Hicklin* v. *Orbeck*, 437 U.S. 518, 532-533 (1978).

In his testimony before the Commission, Administrator Burke discussed the interdependence of the New England

states upon one another for the efficient and reliable distribution of electric power (J.A. 25a-26a). He reviewed the great strides that the states had made, particularly in the area of NEPOOL (J.A. 25a-28a). That system, which serves as a model to the entire country, has, over the years, resulted in great savings to all of its participants, including the people of New Hampshire. Indeed, he testified that today more than ever it seems critical for the New England states to continue to work together to use most efficiently the limited resources which they have and to bring new sources of power into the region (J.A. 27a-28a). Administrator Burke reviewed New Hampshire's past efforts in concert with its neighboring states. He expressed his concern that:

> The withholding of significant amounts of electric power from the NEPOOL system by any member utility or by any state action would, in my opinion, constitute a retreat from the many advances which I have described and would disrupt the workings of this finely tuned and highly efficient system. . . .

(J.A. 27a-28a.)

The PUC, as upheld by the Supreme Court, concluded that New Hampshire's "public good" could be advanced by achieving goals such as providing electric service at the lowest possible cost, and achieving a fair distribution of limited natural resources. Of course, the Commission limited its consideration to what it felt was "good" and "fair" for the people of New Hampshire.[3]

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[3]The Commission made numerous references to what it apparently regarded as unsatisfactory positions taken by NEP and by the Commonwealth of Massachusetts with respect to the problem of the Public Service Company of New Hampshire's Seabrook generating facility (J.S. App. 32a-35a). The precise role of such considerations, if any, in the final decision is unclear. In any case, the PUC did not suggest that Rhode Island had in any way participated in the actions complained of.

It seems obvious that New Hampshire's action is violative of this Court's holdings in cases such as *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623-624 (1978), and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). Indeed, citing *Philadelphia* v. *New Jersey*, the New Hampshire Supreme Court stated that:

> It might be questionable, in the absence of § 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister states . . . .

(J.S. App. 10a.)

In its desire to serve what it perceives as the best interests of its citizens, New Hampshire has sought to breathe life into a statute which is simply unreflective of the realities of modern life. As Administrator Burke noted in his testimony:

> I wish to point out, however, that RSA 374:35 was enacted by the New Hampshire legislature in a different era. In 1913, the electrical power needs of New Hampshire, Rhode Island and all other states were met principally by small size generating units, which abounded throughout the region. Many of those were hydro-electric facilities. As society grew more complex and as modern technology, industry and domestic consumption required increasingly larger amounts of electricity, more sophisticated methods of generation were developed. There developed not only systems of large scale generating facilities, principally of the fossil-fuel type, but also sophisticated transmission and distribution systems, which led to the development of the present interconnect-

ing network throughout the New England region and other parts of the United States and Canada. . . .

(J.A. 25a.)

In sum, the New Hampshire statute clearly violates the Commerce Clause unless such action has been affirmatively authorized by Congress.

C. *In Enacting Section 201(b) of the Federal Power Act, Congress did Not Affirmatively Authorize New Hampshire to Capture the Economic Benefits of NEP's Hydroelectric Generation.*

Despite its reservations about the constitutionality of the New Hampshire statute under the Commerce Clause, the New Hampshire Supreme Court nonetheless relied upon Section 201(b)[4] of Part II of the Federal Power Act to uphold the PUC's actions. Contrary to the New Hampshire Supreme Court's strained interpretation of Section 201(b), that Section simply does not grant the Commission the authority to enrich its citizens at the expense of its neighbors. At best, Section 201(b) preserves whatever lawful authority the PUC might have exercised, consistent with the Commerce Clause and the Supremacy Clause, prior to the passage of Part II of the Federal Power Act.

In the exercise of its authority under the Commerce Clause, Congress may confer upon the states an ability to restrict the flow of interstate commerce that they would not otherwise

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[4] Section 201(b) provides in pertinent part: "(1) the provisions of [Part II] . . . shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted over a state line."

enjoy. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980); *see H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 542-543 (1949). If Congress so acts to permit the states to regulate some aspect of interstate commerce, then such regulatory action by a state, so long as it is within the scope of the Congressional authorization, is not violative of the Commerce Clause. Moreover, such delegations of authority to the states must be explicit, since such a delegation of federal authority will not be presumed. *See Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 547-548 (1837).

Congressional delegation of authority of this type may be expressed in different forms according to the extent of the authority which Congress intends to delegate. In some cases, the states may have previously exercised legitimate authority, and their right to exercise that authority would otherwise be terminated by some Congressional action. If Congress wished to permit the states to continue to exercise those powers which they had previously lawfully exercised, then Congress will customarily express this intent in a savings clause. For example, in the *BT Investment* case, the Court considered the following language:

> The enactment by the Congress of the Bank Holding Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

447 U.S. at 45 n.12. The Court found such language and its accompanying legislative history to indicate an intent to permit the states to continue to exercise powers which they legitimately possessed prior to the enactment of the legislation. In other words, "it appears that Congress' concern was to define

the extent of the federal legislation's preemptive effect on state law." 447 U.S. at 49.

On the other hand, Congress is free to delegate to the states authority which they would not otherwise possess in the absence of such a delegation. When Congress so acts, the states are free to exercise the delegated authority to the extent set forth in such delegation. Typically, such delegations of new or additional authority to these states have been couched in clear and explicit terms.

When one examines Section 201(b) on its face and in the circumstances of its enactment, one is lead inescapably to the conclusion that it is merely a savings clause and not a source of new authority. Section 201(b) provides in relevant part that:

> The provisions of [Part II] . . . shall not . . . *deprive* a State or State commission of its *lawful authority now exercised* over the exportation of hydroelectric energy which is transmitted over a state line. (Emphasis added.)

Webster's Third New International Dictionary, 606-607 (1971), defines the word "deprive" to mean "to take away," "to take something away from," "to take an office, dignity or benefice from," "remove from office" or to "keep from the possession, enjoyment, or use of something." In everyday use, it usually implies "a taking away of what one has, owns, or has a right to." Therefore, Congress plainly intended to preserve *existing* rights, not to grant new ones. Indeed, this becomes increasingly clear as one moves through the text of Section 201(b).

Congress went on to describe what was not to be "deprived" as "lawful authority now exercised." If Congress did not entertain certain reservations about the lawful character of the "authority now exercised," then it would not have been neces-

sary for them to qualify the phrase "authority now exercised" with the word "lawful." Certainly, with the deletion of the word "lawful," a much stronger argument could be made that it was the intent of Congress to preserve and legitimize *all* of the authority previously exercised by the states in that area.

The New Hampshire Supreme Court likewise had difficulty in interpreting Section 201(b). If the Court found that the words of that Section constituted a grant of new authority, then the Court likewise implicitly found that the authority which the state had purported to exercise prior to the passage of Section 201(b) did not in fact exist. On the other hand, if Section 201(b) was interpreted as a savings clause, then the Court had to address the question as to whether or not what was saved was sufficient in scope to justify the actions taken in 1980. The Court resolved this question in the following fashion:

> Thus [201(b)] was specifically intended to preserve the power of a State or its Commission over exportation of electricity under then existing laws similar to the New Hampshire statute, which were recognized as valid and lawful. *See*: *Safe Harbor Water Power Corporation*, 5 F.P.C. 221, 235 (1946); *United States* v. *Public Utilities Commission*, 345 U.S. 295, 300 n.4 (1953).

(J.S. App. 7a-8a.) This reading of the statute strains the plain meaning of the language. Congress had no reason to include, as a matter of draftsmanship, a conclusion that existing state legislation in this regard was lawful. As will be shown hereafter, nothing in the legislative history of this Act suggests that Congressman Rogers sought such an imprimatur from his colleagues. Moreover, neither of the cases upon which the New Hampshire Supreme Court relied were required to address the

precise point upon which the New Hampshire Court sought authority.

The much more logical approach is to assume that Congressman Rogers' colleagues were not without sympathy for his position. At the same time, however, Congress was engaged in filling the "Attleboro Gap," a matter of expanding federal jurisdiction rather than expanding state jurisdiction. Consequently, the original Senate version of Part II did not include the savings clause. From its legislative history, one can determine that the savings clause was added by the House Commerce Committee. H.R. Rep. No. 1318, 74th Cong., 1st Sess. 18, 27 (1935). New Hampshire's Congressman Rogers explained his perception of the addition's purpose:

> the Senate bill as originally drawn would deprive certain states, I think five in all, of certain rights which they have over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House Committee, and I hope when you come to it, Section 201 of part II, that you will grant us the privilege to continue, as we have been for 22 years, to exercise our state right over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of old New Hampshire.

79 Cong. Rec. 10527 (1935).

This Gordian Knot is swiftly cut when one considers the state of the law at the time of the passage of Section 201(b). As this Court has noted, a review of the law from which the statute in question emerged is a valuable key to statutory construction. *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106, 112 (1948). In fact, at the time Part II of the Federal Power Act was being considered, there remained a

substantial issue as to the constitutionality of acts such as the New Hampshire statute. L. Smith, *The Power Policy of Maine*, 113-152 (1951). Presumably, Congress was aware of this uncertainty surrounding such acts. *See United States* v. *Neustadt*, 366 U.S. 696, 707-708 (1961).

If one could for a moment place oneself in the place of one of Congressman Rogers' colleagues, the following thought process seems best to fit the available facts. On the one hand, Congressman Rogers has made a plea for some consideration for what he regards as important and long-standing states' rights. On the other hand, there remain substantial legal questions as to whether or not these states had ever had those rights which the Congressman sought to have authorized in Part II of the Federal Power Act. It is submitted that Congress decided to give Congressman Rogers *exactly* what he asked for, namely, that whatever rights this state *lawfully* exercised prior to the passage of this Act would continue in existence. On the other hand, by the use of the qualifying term "lawful" in the statute, our hypothetical Congressman at the same time declined to grant the states any new rights. It is submitted that this explanation is perfectly logical, consistent with all known facts, and explains why the language of Section 201(b) reads as it does. As this Court pointed out in *Lynch* v. *Altworth-Stephens Co.*, 267 U.S. 364, 370 (1925):

> The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

In sum, Section 201(b) does not legitimize the PUC's unlawful attempt to garner for itself the energy which would other-

wise flow in interstate commerce in accordance with the existing FERC approved rates and contracts.

II. Part I of the Federal Power Act Preempts the New Hampshire Statute as Applied by the PUC.

Appellants herein believe that this Court need look no further than their argument in Part I in order to dispose of this matter. Accordingly, these Appellants will rely upon the arguments and authorities relied upon by the Appellants in Nos. 80-1208 and 80-1471 on this issue and incorporate them by reference herein for consideration by this Court in the event that the Court wishes to consider this issue.

III. Part II of the Federal Power Act Preempts the New Hampshire Statute as Applied by the PUC.

Appellants herein believe that this Court need look no further than their argument in Part I in order to dispose of this matter. Accordingly, these Appellants will rely upon the arguments and authorities relied upon by the Appellants in Nos. 80-1208 and 80-1471 on this issue and incorporate them by reference herein for consideration by this Court in the event that the Court wishes to consider this issue.

IV. The New Hampshire Statute, as Construed and Applied by the PUC and the New Hampshire Supreme Court, Violates the Privileges and Immunities of the Citizens of the State of Rhode Island and the Commonwealth of Massachusetts in Contravention of Article IV, § 2 of the United States Constitution.

Appellants herein believe that this Court need look no further than their argument in Part I in order to dispose of this

matter. Accordingly, these Appellants will rely upon the arguments and authorities relied upon by the Appellants in Nos. 80-1208 and 80-1471 on this issue and incorporate them by reference herein for consideration by this Court in the event that the Court wishes to consider this issue.

V. If Congress has Exempted the New Hampshire Statute from the Reach of the Commerce Clause, Then Congress has Violated that Clause by Favoring One State over Another in an Area of Fundamental Economic and Social Importance, or, Alternatively, Congress has Violated the Rights of the State of Rhode Island and Its Citizens and the Commonwealth of Massachusetts and Its Citizens, as Guaranteed by the Tenth Amendment or the Privileges and Immunities Clause.

Appellants herein believe that this Court need look no further than their argument in Part I in order to dispose of this matter. Accordingly, these Appellants will rely upon the arguments and authorities relied upon by the Appellants in Nos. 80-1208 and 80-1471 on this issue and incorporate them by reference herein for consideration by this Court in the event that the Court wishes to consider this issue.

Conclusion.

The decision below should be reversed.

Respectfully submitted,

DENNIS J. ROBERTS II,
Attorney General of Rhode Island,
JOHN R. McDERMOTT,
Special Assistant Attorney General,
72 Pine Street,
Providence, Rhode Island 02903.
(401) 274-4400
Counsel of Record

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